UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

HANNA ALBINA and AUSTIN WILLARD, individually and on behalf of others similarly situated, Plaintiffs, vs. THE ALIERA COMPANIES, INC., TRINITY HEALTHSHARE, INC., and ONESHARE HEALTH, LLC d/b/a UNITY HEALTHSHARE, LLC, Defendants.	CIVIL ACTION NO. 5:20-cv-00496-JMH

DEFENDANT ONESHARE HEALTH, LLC'S MOTION TO COMPEL ARBITRATION OR, IN THE ALTERNATIVE, TO DISMISS COUNTS I–IV

Pursuant to Fed. R. Civ. P. 12(b)(6) and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), Defendant OneShare Health, LLC ("Unity")[1] moves to compel arbitration and dismiss this action. While the Court should compel arbitration without reaching the merits, if it were to do so, the Court should dismiss Counts I-IV for failure to state a claim.

INTRODUCTION

Unity is a Health Care Sharing Ministry ("HCSM"), founded in Scripture and the core Biblical belief that we all have an obligation to share in each other's burdens. *See, e.g.*, Galatians 6:2 ("Carry each other's burdens, and in this way you will fulfill the law of Christ."). HCSMs like Unity are 501(c)(3) non-profit charitable organizations through which people with the same religious or ethical beliefs join together to share in paying each other's medical expenses. The

[1] Unity is now known as OneShare Health, LLC. Because this case involves the time period when OneShare was known as Unity, it will be referred to as Unity for ease of reference.

HCSM administers the members' sharing of medical expenses in accordance with established guidelines; but, unlike insurance, the HCSM itself does not undertake any obligation to indemnify the members or pay anything on their behalf in exchange for a premium. Rather, it acts only as a clearinghouse between the members and facilitates their sharing of expenses.

HCSMs have gained popularity across the country in recent years. According to the Alliance of Health Care Sharing Ministries, more than 1.5 million people currently participate in HCSMs in the United States (and over 11,000 in Kentucky alone).[2] While HCSMs may function in some ways similar to insurance, they are unmistakably ***not insurance***. In fact, from 1994 to 2016, 30 states—including Kentucky, *see* KRS 304.1-120(7)—passed specific safe harbor laws for HCSMs to clarify their nature and ensure they are not regulated as insurance.[3] Likewise, in passing the Affordable Care Act ("ACA") in 2010, the federal government explicitly recognized HCSMs as an alternative to health insurance, exempting from the individual mandate members of HCSMs that meet 26 U.S.C. § 5000A(d)(2)(B)'s requirements. In creating this special exemption, the federal government recognized that HCSMs were not insurance.

Unity meets the requirements of KRS 304.1-120(7), fully qualifying as an HCSM under Kentucky's HCSM law, and as such, is not subject to insurance regulation. This is further validated by the fact that Unity has operated as an HCSM freely and openly in Kentucky for years without any suggestion by the Kentucky Department of Insurance that it is engaging in insurance. Additionally, Unity is ACA-exempt under federal law as the Center for Medicare & Medicaid Services ("CMS") has expressly recognized that Unity's parent Anabaptist Healthshare (AHS) meets the requirements of 26 U.S.C. § 5000A(d)(2)(B), and Unity derives its status through AHS.

[2] *See* http://ahcsm.org/about-us/data-and-statistics/

[3] *See* http://ahcsm.org/issues/#state

To complete the enrollment in Unity's HCSM plans, members must attest to sincerely held Biblical beliefs as a condition of membership. No reasonable consumer could confuse this with purchasing conventional health insurance. But even if that were possible, it is made clear that the membership is not insurance. Members of Unity are fully informed at the outset that they are joining a faith-based non-profit that facilitates medical cost sharing by coordinating member contributions and assigning those contributions to satisfy the medical bills of other members of the group. Each member is informed that Unity is not assuming risk or guaranteeing payment as an insurer would do, but is merely facilitating and administering sharing among members who choose to participate in the program. Unity explains these principles in its application and Member Guide, and members expressly acknowledge that membership is "not insurance but is a voluntary medical needs sharing ministry" and "should never be considered as a substitute for an insurance policy."

Notwithstanding these disclosures and acknowledgements, two former Unity members claim here that Unity is not an HCSM and that their memberships constituted illegal insurance policies under Kentucky law. Setting aside the lack of merit of their allegations, Plaintiffs cannot bring their claims in court. By consenting to the terms and conditions set out in Unity's Member Guide, Plaintiffs entered into arbitration agreements (the "Arbitration Agreements") that require them to individually arbitrate the claims that they attempt to now bring. Moreover, Plaintiffs agreed that any issues of arbitrability, including issues of validity, enforceability, and scope of the Arbitration Agreements, would be decided by an arbitrator, rather than a court.

Accordingly, the FAA requires Plaintiffs to arbitrate their claims. In a case against only Trinity and Aliera involving materially similar claims and arbitration agreements, the District Court for the Western District of Washington recently compelled arbitration. *See Jackson v. Aliera Cos.*, No. 19-cv-01281-BJR, 2020 U.S. Dist. LEXIS 149772, at *14 (W.D. Wash. Aug. 18, 2020).

The same result should follow here. And while this Court should compel arbitration without addressing the merits, if it were to do so, Counts I-IV should be dismissed under Rule 12(b)(6).

FACTUAL BACKGROUND

Unity is a recognized HCSM that is part of an established history of faith-based medical expense sharing. Unity's parent, Anabaptist Healthshare ("AHS"),[4] is a non-profit public charity that manages an HCSM servicing the Anabaptist community in Virginia, where AHS's predecessors have been engaged in sharing for many years. (Hochstetler Dec. ¶ 3, attached as Exh. 1; Compl. ¶ 34.)[5] CMS has recognized AHS as a valid HCSM whose members are exempt from the ACA and its individual mandate. (*Id.* at ¶ 4.) In 2016, AHS created Unity as a wholly-owned subsidiary to expand AHS's healthcare sharing ministry. (*Id.* at ¶ 5.)[6]

Beginning in late 2016, Aliera served as the third-party administrator for the Unity HCSM plans. (Compl. ¶¶ 35–36; Hochstetler Dec. ¶ 7.) Aliera and AHS offered Unity HCSM plans in various states, including Kentucky. (Compl. ¶¶ 35–36, 39.) Plaintiffs Hanna Albina and Austin Willard enrolled in Unity HCSM plans in 2018, when those plans were administered by Aliera. (Compl. ¶¶ 73, 95.) They completed and signed membership application forms that authorized payment of an application fee and sharing contributions, and also acknowledged various terms and conditions of membership. (Albina Application, attached as Exh. 2; Willard Application,

[4] AHS is now known as OneShare International.

[5] Unity relies on Mr. Hochstetler's declaration only to support its motion to compel arbitration.

[6] Unity is disregarded as a separate entity by the IRS, both for purposes of taxation and for establishing that Unity qualifies as a charitable 501(c)(3) organization; as a result, AHS and Unity are considered together when determining ACA-exempt status. (*Id.* at ¶ 8.) Indeed, in certifying AHS, CMS requested that AHS notify it of any changes to the ministry. In accordance with this instruction, AHS informed CMS that AHS planned to use Unity to open "its doors of sharing to a broader bases outside of the Anabaptist community" and "make a bigger impact for Jesus Christ through this Ministry.". (*Id.* at ¶ 6.) Furthermore, in litigation between Aliera and Unity, the Superior Court of Fulton County, Georgia, recognized that AHS and Unity are valid HCSMs. (Order Entering Interloc. Injunction and Appointing Receiver, *Aliera Healthcare, Inc. v. Anabaptist Healthshare, LLC*, No. 2018CV308981 (Fulton Cnty. Super. Ct., Ga.).)

Appendix O to Compl., DN 1-19) (collectively, the "Applications").[7] The Applications include the express acknowledgement that the Unity HCSM "is not insurance but is a voluntary medical needs sharing ministry." (*Id.*) Their terms also state: "I understand that the [member] guidelines are part of and incorporated into this UHS Application as if appended to it." (*Id.*) Mr. Albina and Mr. Willard both electronically signed their Applications. (*Id.*) Immediately above their signatures was the statement: "By electronically acknowledging this authorization, I acknowledge that I have read and agree to the terms and conditions set forth in this agreement." (*Id.*)

Plaintiffs also received and agreed to the terms of the Unity Member Guide, which require a specific process for dispute resolution involving internal appeals and mediation, followed by binding arbitration. (*See* Unity Member Guide, Appx. A to Compl., DN 1-5.) The Unity Member Guide states that if a member's dispute with Unity is not resolved through mediation, "the matter shall be resolved by . . . legally binding arbitration" governed by the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries (the "CC Rules"). (*Id.* at 12.) It further provides that "[the CC Rules] will be the sole and exclusive procedure for resolving any dispute between individual members and [Unity] when disputes cannot be otherwise settled," and that members "expressly waive their right to file a lawsuit in any civil court" other than to enforce an arbitration decision. (*Id.*)

Mr. Albina and Mr. Willard claim that they did not receive a copy of the Unity Member Guide until after they enrolled. (Compl. ¶¶ 79, 101.) However, Mr. Albina and Mr. Willard both received welcome emails within hours of submitting their Applications containing a link to the Unity Member Guide. (*See* Kathleen Kromodimedjo Dec., attached as an exhibit to Aliera's

[7] Unity's reliance on Mr. Albina's Application (Exh. 2) does not convert Unity's alternative motion to dismiss into one for summary judgment, because Mr. Albina's Application is referred to in and is central to the Complaint.

concurrently filed motion, ¶¶ 6, 20 (attesting that Plaintiffs received welcome emails the same day they submitted their applications); *see also* Albina Welcome Email, DN 1-14; Willard Welcome Email, DN 1-18.) Further, their memberships did not become effective until approximately two weeks after they submitted their applications. (Kromodimedjo Dec., ¶¶ 6–7, 20–21 (explaining that Mr. Albina's and Mr. Willard's memberships did not become effective until 13 and 16 days, respectively, after their receipt of the welcome emails).) Until that point, they could have withdrawn their applications prior to their membership effective dates and received a refund of their application fee. (*Id.* at ¶¶ 7, 21.) When signing the Applications, each Plaintiff affirmed that he "may terminate this Member Agreement at any time and for any or for no reason" and that his "$125 application fee will be refunded automatically" if he "withdraw[s] [his] application prior to [his] membership effective date." (Albina Application, Exh. 2; Willard Application, DN 1-19.)

Despite the opportunity to cancel and receive a refund, Plaintiffs instead maintained their memberships for many months ***after*** receiving copies of the Unity Member Guide directly by email, repeatedly ratifying the terms of membership. (*See* Unity Member Guide, Appx. A to Compl., DN 1-5, at 9) (providing that members are free to cancel their memberships upon 30 days' notice).) After AHS terminated its agreement with Aliera in August 2018 and Aliera began offering plans through Trinity, Mr. Albina and Mr. Willard allege that they moved from Unity to Trinity, with Aliera continuing to administer their HCSM plans. (*Id.* ¶ 47.) Mr. Albina and Mr. Willard both remained on the Aliera-administered Unity and Trinity plans ***for over 15 months***—repeatedly paying monthly contributions, enjoying benefits under the Member Guides including receiving medical expense sharing, and being bound by arbitration provisions. (*See* Compl. ¶¶ 73, 91 (alleging that Mr. Albina became a member of Unity on July 19, 2018, and remained a member through November 18, 2019); *id.* at ¶¶ 95, 106 (alleging that Mr. Willard became a member of

Unity on February 26, 2018, and remained a member of Unity, and then Trinity, through at least May 20, 2020); *see also* Kromodimedjo Dec., ¶¶ 6–9, 20–21, 30, 41.)

Ignoring their Arbitration Agreements, Plaintiffs have brought this putative class action alleging that Unity's HCSM plans constitute "illegal insurance," and that Unity, through Aliera, breached the UCSPA, committed bad faith, engaged in false advertising, and breached fiduciary duties. Plaintiffs seek to represent a class of "[a]ll persons who, while a Kentucky resident, purchased or were covered by a plan from Aliera and either [Unity] or [Trinity] that purported to be a 'health care sharing ministry.'" (Compl. ¶ 21.) The Court should enforce Plaintiffs' valid agreements to arbitrate and compel arbitration. As such, this Court should not address the merits of the claims, but if it were to do so, Counts I-IV should be dismissed for failure to state a claim.

STANDARD

This Court has held that a motion to compel arbitration is most properly considered as a motion for summary judgment under Fed. R. Civ. P. 56 when, as here, the parties submit matters outside the pleadings. *See FCCI Ins. Co. v. Nicholas Cnty. Library*, No. 5:18-cv-038-JMH, 2019 U.S. Dist. LEXIS 42156, at *12–13 (E.D. Ky. March 15, 2019). So, while the Court must construe the facts in the light most favorable to Plaintiffs, it does not accept the Complaint's factual allegations as true. *Id.* at *13. Instead, the Court should grant Unity's motion if "no genuine dispute exists as to any material fact" concerning whether arbitration should be compelled. *Id.* Further, because the Arbitration Agreements provide that they are governed by the FAA, the FAA controls the agreements, "including threshold questions about the arbitrability of claims." *Id.* at *14; *see also MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906–07 (Ky. 2013) (holding that the Kentucky Arbitration Act does not apply when the arbitration agreement provides that the FAA governs).

With respect to Unity's alternative motion to dismiss, a Rule 12(b)(6) motion should be granted if the plaintiff does not allege a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court accepts all factual allegations as true, *U.S. ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 407 (6th Cir. 2016), it does not accept unreasonable inferences or legal conclusions cast in the form of factual allegations. *See Iqbal*, 556 U.S. at 681. A court may also consider "matters of public record[] as well as documents attached to the defendant's motion to dismiss if they are referred to in the complaint and are central to the plaintiff's claims." *Preferred Auto. Sales, Inc. v. DCFS United States, LLC*, 625 F. Supp. 2d 459, 460 n.1 (E.D. Ky. 2009) (citation omitted).

ARGUMENT

I. Plaintiffs must arbitrate their claims against Unity, including threshold questions of arbitrability.

The FAA provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA "declare[s] a national policy favoring arbitration." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008). The Supreme Court has described the FAA as reflecting both "a liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Id.* at 339 (citations omitted); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (courts must "rigorously enforce arbitration agreements according to their terms").

To further the FAA's purposes, the Supreme Court has emphasized that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). In addition, the Supreme

Court has instructed that courts should "move the parties to an arbitrable dispute out of court and into arbitration as ***quickly and easily as possible***," *Preston*, 552 U.S. at 357 (emphasis added), as a failure to do so would undermine the FAA's intent to effectuate parties' desire to use an alternative dispute resolution process to avoid the expense and inefficiencies of litigation.

The Court should compel arbitration because Plaintiffs entered into valid written agreements to arbitrate and agreed to arbitrate the question of arbitrability. *See* 9 U.S.C. §§ 3, 4. And because Plaintiffs agreed to arbitrate the question of arbitrability, the Court's analysis should end with determining that the parties consented to arbitration agreements with valid delegation clauses, without ruling upon any arguments Plaintiffs might bring regarding the scope or enforceability of the Arbitration Agreements.

A. Plaintiffs agreed to arbitrate their claims against Unity.

Plaintiffs agreed to arbitrate—not litigate—the claims they now assert. By applying for and participating in Unity's sharing plan, Plaintiffs agreed to the terms and conditions in the Unity Member Guide, which in turn include the Arbitration Agreements stating that Plaintiffs agreed to resolve any disputes with Unity through binding arbitration. (*See* Albina Application, Exh. 2; Willard Application, DN 1-19; Unity Member Guide, DN 1-5, at 12–13.)

Plaintiffs' allegations that they did not receive a copy of the Unity Member Guide prior to submitting their Applications (Compl. ¶¶ 79, 101) do not change this result. "In Kentucky, incorporation by reference is a historic common-law doctrine." *13 Triple Crown Holdings, LLC v. Lowe's Home Ctrs., LLC*, No. 5:19-cv-00057-JMH, 2019 U.S. Dist. LEXIS 123326, at *19 (E.D. Ky. July 24, 2019) (citations and brackets omitted). Because Plaintiffs' signatures on the Applications appear below the statement incorporating the Unity Member Guide, they agreed to be bound by the incorporated terms. *See id.* Further, even if Plaintiffs had not been provided a copy of the incorporated terms, the Applications specifically alerted Plaintiffs to the fact that they

were also agreeing to be bound by the terms of the Unity Member Guide. (Albina Application, Exh. 2; Willard Application, DN 1-19 ("I understand that the [member] guidelines are part of and incorporated into this UHS Application as if appended to it.").) Plaintiffs therefore had a duty to inquire about the terms contained in the Unity Member Guide before signing the Applications. That they allegedly chose not to do so does not relieve them of their contractual obligations.

Courts in the Sixth Circuit have found mutual assent to arbitration in similar circumstances. In *Treved Exteriors, Inc. v. Lakeview Constr., Inc.*, No. 13-83-DLB-JGW, 2014 U.S. Dist. LEXIS 34736 (E.D. Ky. Mar. 18, 2014), the plaintiff signed subcontracts that incorporated by reference "terms and conditions" containing an arbitration provision. *Id.* at *12. In enforcing the arbitration provision, the court reasoned that "[e]ven if Plaintiff did not receive the terms and conditions along with the subcontracts, the incorporating language should have alerted Plaintiff to this error." *Id.* Consequently, because "[i]gnorance of the terms of [a] contract" will not relieve a party who had an opportunity to read the contract from its obligations, the plaintiff was bound by the arbitration provision. *Id.* (citations omitted). Likewise, in *Bi-State Insulation, Inc. v. Geiler Co.*, No. 1:19-cv-40, 2019 U.S. Dist. LEXIS 100919 (S.D. Ohio June 17, 2019), the court ruled that the plaintiff had a "duty to inquire" about the terms of a master agreement that was incorporated by reference into the subcontracts the plaintiff signed. *Id.* at *10 (citation omitted). "By signing the subcontracts . . . the plaintiff expressed its assent to the arbitration provision set forth in the master agreement." *Id.* (citation omitted). Thus, as in *Treved* and *Bi-State*, because Plaintiffs were informed that the Unity Member Guide was incorporated into the Application and could have inquired further before signing, the Arbitration Agreements are supported by mutual assent even if Plaintiffs did not receive the Unity Member Guide until after submitting their Applications.

Further, mutual assent is independently supported by Plaintiffs' failure to cancel their

memberships after they received the Unity Member Guide but before their memberships became effective. Immediately following submission of their Applications, Plaintiffs were emailed copies of the Unity Member Guide. (*See* Kromodimedjo Dec., ¶¶ 6, 20; Albina Welcome Email, DN 1-14; Willard Welcome Email, DN 1-18.) They then had approximately two weeks before their memberships became effective during which they could review the Unity Member Guide and cancel with a full refund. (*See* Albina Application, Exh. 2; Willard Application, DN 1-19 (providing that applicants may terminate and receive a full refund if they withdraw their applications prior to their membership effective dates; *see also* Kromodimedjo Dec., ¶¶ 6–7, 20–21 (explaining that Mr. Albina's and Mr. Willard's memberships did not become effective until 13 and 16 days, respectively, after their receipt of the welcome emails).) Their failure to cancel within the time allotted constitutes mutual assent to the terms of the Unity Member Guide.

There is even more undisputed evidence of mutual assent. Plaintiffs not only failed to cancel during the period allowed before their memberships became effective, but both Plaintiffs maintained memberships in the Aliera-administered Unity and Trinity plans ***for over 15 months***—repeatedly ratifying the terms of the Member Guide including the Arbitration Agreements by making monthly membership contributions and enjoying the benefits of HCSM membership including receiving medical expense sharing. (*See* Compl. ¶¶ 73, 91 (alleging Mr. Albina became a member of Unity on July 19, 2018, and remained a member through November 18, 2019); *id.* at ¶¶ 95, 106 (alleging Mr. Willard became a member of Unity on February 26, 2018, and remained a member of Unity, and then Trinity, through at least May 20, 2020); *see also* Kromodimedjo Dec., ¶¶ 6–9, 20–21, 30, 41.) In light of their long-term memberships, Plaintiffs cannot credibly claim they never assented to the terms of the Member Guide.

As the Sixth Circuit has explained, these types of "accept-or-return" contracts are widely

enforced by courts in multiple jurisdictions and "rel[y] on the proposition that a contract is formed not at the time of purchase or earlier but rather when the purchaser either rejects by seeking a refund or assents by not doing so within a specified time, providing the purchaser with an opportunity to review the proposed terms." *Higgs v. Auto. Warranty Corp. of Am.*, 134 F. App'x 828, 831 (6th Cir. 2005) (collecting cases and citations omitted) (applying the FAA and Ohio law). In *Higgs*, the Sixth Circuit ruled that the plaintiff assented to an arbitration agreement in a "service contract" that he did not receive until after he submitted his application and payment because he had 10 days upon receipt of the service contract to cancel and receive a refund but did not do so. *Id.*; *see also, e.g.*, *Hill v. Gateway 2000*, 105 F.3d 1147, 1148–50 (7th Cir. 1997) (enforcing arbitration provision in an "accept-or-return" contract for purchase of a computer); *MDB, LLC v. BellSouth Advert. & Publ'g Corp.*, No. 3:07-cv-126, 2007 U.S. Dist. LEXIS 70277, at *9 (E.D. Tenn. Sep. 21, 2007) (enforcing forum selection clause in an "accept-or-return" contract).

In sum, by completing and agreeing to the Applications, Plaintiffs expressly agreed to the terms of the Unity Member Guide, including its Arbitration Agreements. Then, by foregoing the opportunity to cancel before the membership became effective and instead maintaining their memberships for months and making monthly contributions, Plaintiffs reaffirmed their agreement over-and-over again. On these facts, Plaintiffs cannot avoid the Arbitration Agreement simply by claiming that they signed up for Unity's HCSM plan without requesting or reviewing the applicable terms and conditions of the Member Guide that was emailed to them to review prior to the membership becoming effective.

B. The parties clearly and unmistakably delegated all questions of arbitrability to the arbitrator.

"The question of arbitrability is one for the courts unless the parties 'clearly and unmistakably provide otherwise.'" *McGee v. Armstrong*, 941 F.3d 859, 865–66 (6th Cir. 2019)

(quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). The incorporation of a set of arbitration rules that in turn delegates questions of arbitrability to the arbitrator constitutes such a "clear and unmistakable" delegation. *Id.*

Here, the Arbitration Agreements mandate "legally binding arbitration in accordance with [the CC Rules]" and provide that "[the CC Rules] will be the sole and exclusive procedure for resolving any dispute between individual member and [Unity] when disputes cannot be otherwise settled." (Unity Member Guide, DN 1-5, at 12.) In turn, the CC Rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitration of any claim or counterclaim." Rule 34(B), https://www.instituteforchristianconciliation.com/rules-2019/.

The Sixth Circuit in *McGee* held that the incorporation of arbitration rules with a delegation clause materially identical to CC Rule 34(b) constituted a "clear and unmistakable" delegation clause. 941 F.3d at 866. This Court should reach the same result and hold that the arbitrator must decide any issues relating to the scope, validity, or enforceability of the Arbitration Agreements.

C. In the alternative, even if the parties did not delegate arbitrability to the arbitrator, Plaintiffs' claims are arbitrable.

As stated above, the parties agreed to arbitrate arbitrability. But even if questions of arbitrability were not delegated and this Court were to decide them, there is no material dispute of fact that the Arbitration Agreements are enforceable and require arbitration of Plaintiffs' claims.

1. Plaintiffs' claims fall within the scope of the Arbitration Agreements.

Plaintiffs expressly agreed that any and all disputes they might have with Unity are subject to arbitration. (Unity Member Guide, DN 1-5, at 12–13.) The Arbitration Agreements require arbitration of "***any*** dispute [a member] ha[s] with or against [Unity]." (*Id.* at 12 (emphasis added).) Likewise, the Arbitration Agreements also state that arbitration "shall be the sole remedy for ***any***

controversy or claim arising out of the Sharing Guidelines . . . .” (*Id.* at 12–13 (emphasis added).) Because the Arbitration Agreements require that “any” disputes members might have with Unity must be submitted to arbitration, without exception, all of Plaintiffs’ claims asserted in this lawsuit fall within the scope of the Arbitration Agreements and must be arbitrated. *Cf. Lowry v. JPMorgan Chase Bank, N.A.*, 522 F. App’x 281, 283 (6th Cir. 2013) (compelling arbitration based on agreement to refer “any claim or dispute” to arbitration).

2. KRS 417.050(2) does not prohibit enforcement of the parties’ Arbitration Agreements.

Presumably, Plaintiffs will argue that KRS 417.050(2) precludes enforcement of the Arbitration Agreements. (*See* Compl. ¶¶ 71, 126.) That statute provides that arbitration agreements in “insurance contracts” are unenforceable. In addition, the McCarran-Ferguson Ferguson Act “‘reverse preempt[s]’ the FAA to save KRS 417.050(2) from federal preemption.” *Nat’l Home Ins. Co. v. King*, 291 F. Supp. 2d 518, 530 (E.D. Ky. 2003).

a. Whether the Unity HCSM plan is an “insurance contract” within KRS 417.050(2) is a threshold issue of arbitrability to be decided by an arbitrator, not this Court.

The question of whether Unity’s HCSM plans were “insurance contracts” within the meaning of KRS 417.050(2) is a question of arbitrability that the Arbitration Agreements’ delegation clauses place firmly in the hands of the arbitrator, not this Court. *See Milan Express Co. v. Applied Underwriters Captive Risk Assur. Co.*, 590 F. App’x 482, 484–86 (6th Cir. 2014) (because the parties’ arbitration agreement contained a delegation clause, the question of whether the arbitration agreement was invalid under Nebraska’s analogue to KRS 417.050(2) was a gateway question of arbitrability for the arbitrator); *see also S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 146 (3d Cir. 2016) (concluding that the arbitrator must decide “the precise nature” of a reinsurance participation agreement and whether

it fell within the scope of Nebraska's analogue to KRS 417.050(2)).

Further, this Court should not rule on the applicability of KRS 417.050(2) as a threshold question of arbitrability, because to do so would effectively decide the merits of Plaintiffs' central claim that Unity's HCSM is "illegal insurance." As the Supreme Court has instructed, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *See AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 649 (1986); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("A court has no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration . . . .") (internal quotation marks omitted).

Lower courts have followed the Supreme Court's command and held that challenges to the enforceability of arbitration clauses that are necessarily tied to the enforceability of the entire contract must be arbitrated. *See, e.g.*, *Int'l Union v. Cummins, Inc.*, 434 F.3d 478, 486 (6th Cir. 2006) (rejecting argument against arbitration because it "would require [the court] to consider the underlying merits of the claim"); *Jackson*, 2020 U.S. Dist. LEXIS 149772, at *10 (granting Aliera's motion to compel arbitration after concluding that "Plaintiffs' basis for arguing that AlieraCare is illegal and their basis for arguing that the arbitration clause is void are the same").

Simply put, Plaintiffs' claims against Unity are all premised on the allegation that Unity should be deemed "illegal insurance" rather than a valid HCSM that is exempt from insurance law, and thus any challenge to arbitrability on that basis necessarily implicates the parties' core dispute. Assuming the Court or an arbitrator were to disagree that the nature of Unity's plans is clear and that it is necessary to evaluate whether the plans were actually "insurance" under KRS 304.1-030, determining the nature of the plans would require intensive factual development and discovery,

which the parties agreed to submit to the CC Rules.[8] Thus, if the parties were required to litigate the KRS 417.050(2) issue as a threshold arbitrability question, they essentially would have to conduct full discovery on their central dispute under the Federal Rules of Civil Procedure. Doing so would deprive the parties of the key benefits of their agreement to arbitrate: streamlined and less costly discovery, and having an arbitrator (rather than a court) decide the merits of their dispute. Accordingly, the arbitrator, and not this Court, should decide whether Plaintiffs' Unity HCSM plans constitute "insurance" under Kentucky law.

b. Even if it were proper for this Court to consider KRS 417.050(2), it does not apply to an HCSM plan exempted from insurance regulation by KRS 304.1-120(7).

Even if the question of arbitrability were properly before this Court and it were to consider the potential impact of KRS 417.050(2), the statute does not apply. Unity, as an HCSM, is exempt from KRS 304.1-030's definition of "insurance." Kentucky's HCSM safe harbor law, KRS 304.1-120(7), provides that "[n]o provision of [the Kentucky Insurance Code] shall apply to . . . a religious organization" that meets five criteria. Thus, if an entity satisfies KRS 304.1-120(7), it does not enter into "insurance contracts" within the meaning of KRS 304.1-030 and KRS 417.050(2), and the validity of its arbitration agreements is unaffected by KRS 417.050(2).

Unity meets all of KRS 304.1-120(7)'s criteria.[9] First, it is undisputed that Unity is a

[8] Indeed, when the Kentucky Supreme Court considered whether a different HCSM's plans constituted "contracts for insurance" under KRS 304.1-030 and a prior version of KRS 301.1-120(7), it did so only after full discovery and a bench trial. *See Commonwealth v. Reinhold*, 325 S.W.3d 272 (Ky. 2010). The court's analysis depended on a thorough review of the particular HCSM's sharing plans, guidelines, and marketing. *Id.* at 276–78. KRS 301.1-120(7) was later materially amended as a legislative fix to the outcome in *Reinhold*, leaving the substantive result in *Reinhold* of little to no value, but it remains true that determining whether a particular plan is actually a contract for insurance would be a fact-intensive inquiry.

[9] In contrast to the potential need for a fact-intensive analysis of whether Unity's HCSM plans qualify as "insurance" under KRS 304.1-030, the question of whether Unity satisfies KRS 304.1-120(7)'s criteria requires no discovery because Unity's satisfaction of the statutory criteria is clear.

501(c)(3) non-profit religious organization, satisfying subpart (a). (Hochstetler Dec. ¶ 8.) Second, membership in Unity's HCSM plans are limited to participants who share common religious beliefs, satisfying KRS 304.1-207(b). As a condition of membership, Unity members must attest to a Statement of Beliefs based on Biblical principles. The Statement of Beliefs is found in both the Applications and the Unity Member Guide:

> [Unity's] Statement of Beliefs are as follows:
>
> 1. We believe that our personal rights and liberties originate from God and are bestowed on us by God.
>
> 2. We believe every individual has a fundamental religious right to worship God in his or her own way.
>
> 3. We believe it is our moral and ethical obligation to assist our fellow man when he/she is in need according to our available resources and opportunity.
>
> 4. We believe it is our spiritual duty to God and our ethical duty to others to maintain a healthy lifestyle and avoid foods, behaviors or habits that produce sickness or disease to ourselves or others.
>
> 5. We believe it is our fundamental right of conscience to direct our own healthcare, in consultation with physicians, family or other valued advisors.

(Albina Application, Exh. 2; Willard Application, DN 1-19; Unity Member Guide, DN 1-5, at 9–10.) The Unity Member Guide provides that "[i]f at any time during participation in the membership, a violation of the Statement of Beliefs is found, the individual not honoring this standard may be subject to removal from participation in the membership." (*Id.* at 8.). Thus, because individuals who do not abide by Unity's Statement of Beliefs founded on a common religious belief in God are ineligible for membership, subpart (b) is satisfied.[10]

Third, Unity "[m]atches its participants who have financial, physical, or medical needs

[10] Additionally, CMS expressly recognized that Unity's parent, AHS, qualified as an HCSM for purposes of exempting its members from the individual mandate of the ACA. In doing so, it recognized that AHS met 26 U.S.C. 5000A(d)(2)(B)(ii)(II) (Hochstetler Dec. ¶ 4), which provides that "[t]he term 'health care sharing ministry' means an organization . . . members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed." Further, CMS was put on notice when Unity was added to the ministry. (*Id.* ¶ 6.)

with participants who choose to assist with those needs." *See* KRS 304.1-120(7)(c). As the Unity Member Guide explains, "[Unity] is a clearing house that administers voluntary sharing of healthcare needs for qualifying members," meaning that it facilitates members helping other members with their medical needs by "act[ing] as an independent and neutral escrow agent" and "dispensing monthly contributions as describing in the membership escrow instructions and guidelines. (Unity Member Guide, DN 1-5, at 8, 10.) To organize sharing among such a large membership, the members "instruct [Unity] to share clearing house funds in accordance with membership instructions." (*Id.*) In other words, Unity utilizes the guidelines contained in its Member Guide as a way to decide how to match participants' contributions to other participants who have medical needs. Accordingly, Unity satisfies subpart (c).

Fourth, notwithstanding the Complaint's conclusory suggestions to the contrary (Compl. ¶¶ 44, 102), Unity provided the Notice required in KRS 304.1-120(7)(d). The Notice, *verbatim*, appears in Unity's Member Guide, in not less than 10-point font and with the title in bold-faced type. (*See* Unity Member Guide, DN 1-5, at 20). The Notice was incorporated by reference into the Applications. (Albina Application, Exh. 2; Willard Application, DN 1-19, at 3) (stating that "I also understand that the guidelines are part of and incorporated into this [Unity] Application as if appended to it").) Plaintiffs' signatures followed the Application's incorporation-by-reference statement. (*Id.*) Accordingly, all requirements of subpart (d) are met.

Lastly, with respect to KRS 304.1-120(7)(e), Plaintiffs were informed repeatedly that their monthly contributions were voluntary and that there was no guarantee of payment of their medical expenses. Unity's Member Guide explains that "[i]n any given month, the available suggested share amounts ***may or may not*** meet the eligible needs submitted for sharing," and provides for how sharing amounts will be allocated if they are insufficient to meet eligible needs. (Unity

Member Guide, DN 1-5, at 9 (emphasis added).) It also explains that "[m]onthly contributions are ***voluntary contributions or gifts*** that are non-refundable." (*Id.* (emphasis added).) Likewise, members are advised that "[a]s a non-insurance membership, neither [Unity] nor the membership are liable for any part of an individual's medical need." (*Id.*).

Similarly, the Applications require members to affirm that membership "***does not guarantee or promise*** that the eligible medical needs will be shared by the membership" and that membership "should never be considered as a substitute for an insurance policy." (Albina Application, Exh. 2; Willard Application, DN 1-19 (emphasis added).) Members likewise affirm that "there are no representations, promises, or guarantees that my medical needs will be shared on my behalf." (*Id.*) In addition, members acknowledge that "the submission of my monthly contributions is ***voluntary*** and that I am ***not obligated in any way*** to send any money" to Unity. (*Id.* (emphasis added).) Unity thus satisfies KRS 304.1-120(7)(e)'s requirement that it "[s]uggest[] amounts to give that are voluntary among the participants, with no assumption of risk or promise to pay either among the participants or between the participants and the organization."

Because Unity satisfies KRS 304.1-120(7), no part of the Kentucky Insurance Code—including KRS 304.1-030's definition of "insurance"—applies to it, and so Unity's HCSM plans cannot constitute "insurance contracts" subject to KRS 417.050(2)'s prohibition of mandatory arbitration. Indeed, Unity has operated freely and openly in Kentucky for years without any adverse action by the Kentucky Insurance Commissioner or any indication that the Commissioner believes that Unity's sharing plans are "illegal insurance." (Atkins Dec. ¶ 3, attached as Exh. 3.)[11]

[11] *Reinhold* does not compel a contrary result. Although the Kentucky Supreme Court held in *Reinhold* that a different HCSM's plans constituted "insurance" within the meaning of KRS 304.1-030, that determination rested on the particular facts of the case and a prior version of KRS 304.1-120(7). *See* 325 S.W.3d at 276-78. *Reinhold*'s holding is neither controlling nor persuasive in light of subsequent statutory amendments. The Kentucky General Assembly materially amended KRS 304.1-120(7) following the *Reinhold* decision to remove the prong of the statute that the court determined was not met. *See id.* at 278-79. At the time

For all these reasons, while this arbitrability issue is for the arbitrator to decide, even if the Court were able to consider it, KRS 417.050(2) does not invalidate the Arbitration Agreements.

3. The Arbitration Agreements are not unconscionable.

Any challenge Plaintiffs might bring that the Arbitration Agreements are unconscionable would lack merit. "In light of [the] clear constitutional and statutory authorities favoring arbitration," there is a "strong presumption that the general arbitration clause is not unconscionable." *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 575 (Ky. 2012). The "review of arbitration clauses for unconscionability involves a two step process—first, a review focused on the procedures surrounding the making of the arbitration clause (procedural unconscionability) and second, a review of the substantive content of the arbitration clause (substantive unconscionability)." *Id.* It is Plaintiffs' burden to show procedural or substantive unconscionability and they can establish neither.

First, with respect to procedural unconscionability, there is nothing unfair about the process through which the Arbitration Agreements were entered into. Relevant factors include "(1) the bargaining power of the parties, (2) the conspicuousness and comprehensibility of the contract language, (3) the oppressiveness of the terms, (4) the absence of a meaningful choice." *13 Triple Crown*, 2019 U.S. Dist. LEXIS 123326, at *14 (citing *Schnuerle*, 376 S.W.3d at 576). However, "[t]he Kentucky Supreme Court has held that nonnegotiable, take-it-or-leave-it, contracts containing an arbitration agreement are not *per se* procedurally unconscionable." *Id.* at *16 (citing *Schnuerle*, 376 S.W.3d at 576). Likewise, unequal bargaining power is "insufficient in and of itself

Reinhold was decided, KRS 304.1-120(7) required that members' medical expenses be paid "directly from one (1) subscriber to another." *Id.* at 279. Because the HCSM acted as an intermediary between the members, the *Reinhold* court held that the HCSM did not meet all criteria of KRS 304.1-120(7). *Id.* In light of *Reinhold*, the General Assembly eliminated the "direct payment" requirement, and so the fact that members' sharing is facilitated by Unity is permissible under the operative version of KRS 304.1-120(7).

to establish unconscionability." *Id.* at *22–23 (quoting *Preferred Care, Inc. v. Aaron*, No. 16-285-DLB, 2017 U.S. Dist. LEXIS 122421, at *26 (E.D. Ky. Aug. 3, 2017)). Thus, any argument that the Arbitration Agreements are procedurally unconscionable because they were non-negotiable contracts between parties without equal bargaining power would be unavailing.

Further, "while the law is clear that '[a]n undisclosed arbitration agreement . . . cannot bind," the law is "equally clear" that a party "cannot be excused from complying with the arbitration provision if it simply failed properly to read the contract," *id.* at *17–18, including terms incorporated by reference, *id.* at *19–21. Plaintiffs had adequate opportunities—both before the memberships became effective and over the months of their memberships—to inquire about and review the Arbitration Agreements. In fact, they had approximately two weeks after being emailed copies of the Unity Member Guide to cancel with a refund. Further, the CC Rules are available online, where Plaintiffs easily could have accessed them. Thus, Plaintiffs cannot avoid the Arbitration Agreements simply because they failed to review them.

Second, with respect to substantive unconscionability, the terms of the Arbitration Agreements are not unfair. Substantive unconscionability "refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." *Schnuerle*, 376 S.W.3d at 577 (citation omitted). Courts consider "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns." *Id.* (citation omitted).

Plaintiffs' Complaint suggests that they may argue that the Unity Member Guide's pre-arbitration dispute resolution procedures are too onerous. While it is not unreasonable to require Plaintiffs to attempt to resolve issues internally prior to instituting arbitration, pre-dispute procedures are irrelevant because Unity has not attempted, and will not attempt, to enforce them

against Plaintiffs or otherwise require Plaintiffs to complete these steps prior to arbitrating. Plaintiffs also may argue that the location of the arbitration—Fredericksburg, Virginia—is unfair; however, because Unity is a Virginia company (Hochstetler Dec. ¶ 2), the location has a reasonable and rational nexus to the parties' relationship. In any event, Unity would agree to arbitrate closer to Plaintiffs' homes in Kentucky if they requested such an accommodation.

In addition, even if any parts of the Arbitration Agreements were unconscionable—which they are not—in order to give effect to the strong federal policy favoring arbitration, this Court can and should sever the offending parts and enforce the remaining arbitration agreement. *See, e.g.*, *Brookdale Senior Living, Inc. v. Stacy*, 27 F. Supp. 3d 776, 789–90 (E.D. Ky. 2014).

II. If this Court does not compel arbitration, Counts I–IV should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

This Court should compel arbitration for the reasons set forth above and not reach the merits of Plaintiffs' claims. But if the Court were to reach the merits, Counts I-IV should be dismissed with prejudice as they fail to state a claim as a matter of law.

A. "Illegal Contract" is not a cause of action under Kentucky law.

Count I of Plaintiffs' Complaint, titled "Illegal Contract," essentially tries to assert a claim for recession or reformation of the HCSM plans. (Compl. ¶¶ 114–16.) However, "rescission is not on its own a cause of action. Rather, it is a remedy afforded to those plaintiffs in situations of breach of contract, misrepresentation, or non-performance." *Holiday Drive-In, LLC v. Liberty Mut. Ins. Co.*, No. 4:15-cv-00147-JHM, 2016 U.S. Dist. LEXIS 27590, at *8–9 (W.D. Ky. Mar. 4, 2016) (collecting cases); *see also Hatcher-Powers Shoe Co. v. Bickford*, 278 S.W. 615, 619 (Ky. 1925) ("Rescission is purely an equitable remedy.").

Furthermore, there is no plausible basis for rescinding Plaintiffs' HCSM plans. As stated above, Unity's HCSM plans are not "insurance contracts," as Unity itself does not undertake any

risk and, moreover, qualifies for KRS 304.1-120(7)'s exception from regulation as insurance. Likewise, Plaintiffs were informed repeatedly that their HCSM plans were "not insurance" and "should never be considered" as such. (Albina Application, Exh. 2; Willard Application, DN 1-19.) Accordingly, Count I should be dismissed.

B. Plaintiffs' UCSPA and bad faith claims (Counts II and III) fail to state a claim because Unity's HCSM plan is not "insurance" under Kentucky law.

Counts II and III both allege violations of Kentucky's Unfair Claims Settlement Practices Act ("UCSPA"). (*See* Compl. ¶¶ 117–30.) The UCSPA, located at KRS 304.12-010 *et seq.*, is part of the Kentucky Insurance Code. Counts II and III do not plausibly state a claim for relief against Unity, because no part of KRS Chapter 304—including the UCSPA—applies to Unity due to Unity's satisfaction KRS 304.1-120(7)'s criteria. (*See* Section I.C.2.b, *supra*.)

Simply put, Plaintiffs cannot maintain a claim against Unity for purported violations of statutes that do not apply to it. Indeed, the Kentucky Supreme Court recently confirmed the correctness of this interpretation in a case involving a similar exclusion from the Kentucky Insurance Code. *See Merritt v. Catholic Health Initiatives, Inc.*, 612 S.W.3d 822 (Ky. 2020) (the UCSPA does not apply to "captive insurance companies," because KRS 304.49-150 provides that "[n]o provisions of this chapter . . . shall apply to captive insurance companies").

Plaintiffs' common law bad faith claim in Count III fails for similar reasons. Common law bad faith can be asserted only against insurers. *See, e.g., Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993). Because Unity satisfies KRS 304.1-120(7), it is not an "insurer." Common law bad faith also requires that "the insurer must be obligated to pay the claim under the terms of the policy." *Wittmer*, 864 S.W.2d at 890. As an HCSM, Unity is merely a facilitator of sharing among the members pursuant to member guidelines and does not undertake any obligation to pay any claim. Plaintiffs were repeatedly informed that "neither [Unity] nor the membership are liable for

any part an individual's medical need." (Unity Member Guide, DN 1-5, at 9; *see also* Albina Application, Exh. 2, at 3 ("This membership does not guarantee or promise that the eligible medical needs will be shared by the membership."); Willard Application, DN 1-19, at 3 (same).) Thus, without a "contractual obligation to pay . . . claims[,] . . . there exists no statutory or common law basis for a bad faith claim." *Davidson*, 25 S.W.3d at 100.

C. Plaintiffs cannot state a claim for false advertising under KRS 517.030 and KRS 446.070 (Count IV).

Plaintiffs' claim for false advertising fails because they do not plausibly allege that Unity made any false or misleading statements or that they relied on the purported advertising. KRS 517.030, a criminal statute, provides that "[a] person is guilty of false advertising when . . . he knowingly makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons." Civil damages are available only through KRS 446.070, which provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

Obtaining civil damages for a violation of KRS 517.030 requires detrimental reliance on the alleged false advertising and causation. KRS 446.070 permits recovery only of "such damages as [the plaintiff] sustained by reason of the violation"; logically, a person sustains damages from false advertising only if he relies on the false or misleading advertising to his detriment. *See also Sandoz Inc. v. Commonwealth ex rel. Conway*, 405 S.W.3d 506, 510 (Ky. App. 2012) (explaining that to establish civil liability for a violation of KRS 517.030, the plaintiff must prove that the defendant's false advertising was a "substantial factor" in causing it to take a detrimental action).

Here, Plaintiffs make no attempt to claim that Mr. Albina or Mr. Willard ever saw, much less relied upon, any of the alleged advertising described in subsections (a), (d), or (e) of Paragraph

132 of the Complaint. (*See generally* Compl. ¶¶ 73–113.) Similarly, Mr. Willard does not claim any reliance on the purported advertising described in subsection (g). (*See id.* at ¶¶ 95–113.)

Furthermore, Subsection (b) of Paragraph 132 relies on the claim that the HCSM plans were "not insurance." Because Unity satisfies KRS 304.1-120(7), its HCSM plans are not "insurance" under Kentucky law. In addition, the allegations in Subsection (c) do not state a claim, because the alleged statements came from third-parties, not Unity. (Compl. ¶¶ 74, 97). Subsection (f) alleges that the HCSM plan was misrepresented as "coverage," but the Unity Member Guide and Application repeatedly state the opposite and disclose and disclaim that they are not insurance. (Unity Member Guide, DN 1-5, at 9; *see also* Albina Application, Exh. 2, at 3; Willard Application, DN 1-19, at 3).) Therefore, any alleged reliance on purported statements that "Defendants provided coverage for medical expenses" (Compl. ¶ 132(f)), is not reasonable as a matter of law. In addition, with respect to Subsection (f) and Mr. Albina's allegations in Subsection (g), no claim for false advertising is stated by the mere allegation that a specific request for sharing was denied, as requests are properly denied (or applied to a Member Shared Responsibility Amount) when called for by the plan guidelines.

Accordingly, because the Complaint fails to plausibly allege that Mr. Albina and Mr. Willard ever detrimentally relied on any false or misleading advertising from Unity, Count IV fails to state a claim upon which relief can be granted.

CONCLUSION

The parties expressly agreed to arbitrate disputes such as the one presented here, including the question of whether the claims at issue are arbitrable, and so the Court should dismiss this action and compel arbitration. While the Court should compel arbitration without addressing the merits of Plaintiffs' claims, if it were to do so, Counts I-IV of the Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/Robin E. McGuffin
Kyle G.A. Wallace (admitted *pro hac vice*)
Shiver Hamilton, LLC
3490 Piedmont Road, Suite 640
Atlanta, Georgia 30305
kwallace@shiverhamilton.com

and

Chadwick A. McTighe
STITES & HARBISON, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202
Telephone: (502) 587-3400
cmctighe@stites.com

Janet A. Craig
Gregory P. Parsons
Robin E. McGuffin
STITES & HARBISON, PLLC
250 West Main Street, Suite 2300
Lexington, Kentucky 40507
Telephone: (859) 226-2300
jcraig@stites.com
gparsons@stites.com
rmcguffin@stites.com

Counsel for OneShare Health, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by ECF on this 22nd day of February, 2021, upon all counsel of record.

/s/Robin E. McGuffin
Counsel for OneShare Health, LLC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

HANNA ALBINA and AUSTIN WILLARD, individually and on behalf of others similarly situated, Plaintiffs, vs. THE ALIERA COMPANIES, INC., TRINITY HEALTHSHARE, INC., and ONESHARE HEALTH, LLC d/b/a UNITY HEALTHSHARE, LLC, Defendants.	CIVIL ACTION NO. 5:20-cv-00496-JMH

DECLARATION OF TYLER HOCHSTETLER

I, Tyler Hochstetler, declare as follows:

1. I am over the age of eighteen, and I am competent to testify regarding the matters contained herein. I am Chairman of the Board and Founding Board Member at OneShare Health, LLC.

2. OneShare is a limited liability company organized under the laws of Virginia. OneShare is formerly known as Unity Healthshare, LLC, and Kingdom Healthshare Ministries, LLC.

3. Anabaptist HealthShare ("AHS") is the sole member of OneShare. AHS is a non-profit § 501(c)(3) public charity that has managed a successful Heath Care Sharing Ministry ("HCSM") servicing the Anabaptist community in Virginia for several decades.

4. On July 14, 2015, the U.S. Center for Medicare & Medicaid Services ("CMS") approved and certified AHS as a valid HCSM that met all of the requirements of 26 U.S.C. § 5000A(d)(2)(B), and therefore, its members are exempt from the Affordable Care Act and its

individual mandate. A copy of CMS's determination letter dated July 14, 2015 is attached as Exhibit 1.

5. AHS created Unity HealthShare, LLC on November 10, 2016. AHS created Unity as a wholly-owned subsidiary, disregarded for tax purposes, to facilitate and expand AHS's healthcare sharing ministry.

6. AHS later informed CMS that AHS planned to use Unity to open its doors of sharing to a broader base outside of the Anabaptist community and make a bigger impact for Jesus Christ through this Ministry. AHS did not receive any objection from CMS regarding Unity's operation as an HCSM.

7. Beginning in late 2016, Aliera Healthcare, Inc. served as the third-party administrator for the Unity HCSM plans. Through that relationship, AHS and Unity believed that they could expand their ministry and teachings beyond the communities they already served in Virginia.

8. OneShare is a tax-exempt § 501(c)(3) organization. OneShare qualifies as a § 501(c)(3) organization because its sole member is a § 501(c)(3) organization and it has accepted treatment as a disregarded entity. IRS Announcement 99-102, 1999-43 I.R.B. 545 permits an LLC that is wholly owned by an organization that is exempt under § 501(c)(3) of the Internal Revenue Code to be disregarded as an entity separate from its owner. Further, Treas. Reg. Sec. 301.7701-3(b)(1)(ii) provides that a single member LLC may be treated as a disregarded entity unless it elects otherwise. OneShare has a combined audit with AHS (now OneShare International) and the two entities file a single IRS Form 990 (Return of Organization Exempt from Income Tax). Unlike insurance, OneShare does not assume the risk of its members' medical expenses, it does not guarantee coverage, and it does not undertake any obligation to indemnify the members or pay

anything on their behalf in exchange for a premium. Rather, health care sharing ministries like OneShare merely facilitate the sharing of medical expenses among their members in accordance with member guidelines.

9. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: February 18, 2021.

Tyler Hochstetler

Member Information

Name: Hanna ALBINA
Address: [redacted]
Phone: [redacted]
Email: [redacted]
Date of Birth: [redacted]
Gender: M

Dependent Information

Name	Relationship	Date of Birth	Gender	SSN
[redacted]	Spouse	[redacted]	F	[redacted]
	Child		M	
	Child		F	
	Child		M	

Product Information

Unity Healthshare PLUS

Hospitalization, Emergency Room, In-Patient, and Out-Patient procedures are covered, once the Member Shared Responsibility Amount has been met. The Per Incident limit is $250,000 sharing amount, capped at $1,000,000 lifetime sharing amount.

$0.00 per Month for Family
$25.00 one-time Application Fee

Questions

At the core of what Unity does, and how they relate to and engage with one another as a community of people, is a set of common beliefs.

Yes

You acknowledge the first two months of contribution will be used as administration fees.

Yes

Check any of these health conditions you have:

Diabetes Type II

Do you use tobacco in any form?

No

Do you have or ever had Cancer?

No

If you had Cancer, how long ago?

Never

Do you play in any competitive sports?

No

Do you drink excessively?

No

If you drink Alcohol, what is your weekly intake?

Never

Are you pregnant?

No

If applicable, does anyone else in your family applying have any of the above conditions, diseases, and/or ever have or had cancer?

Child 1

If applicable, please fill out any dependent medical information.

asthma

AlieraCare PLUS

Aliera has combined the Aliera 'MEC' solution with the Unity HealthShare Hospitalization. This two-part offering provides more robust care and covers catastrophic hospitalization, with the ability to choose from $5,000 to $10,000 MSRA.

$632.72 per Month for Family
$100.00 one-time Application Fee

Questions

MSRA

5000

Additional Coverage; $500,000 add-on

No

At the core of what Unity does, and how they relate to and engage with one another as a community of people, is a set of common beliefs.

Yes

You acknowledge the first two months of contribution will be used as administration fees.

Yes

Check any of these health conditions you have:

Diabetes Type II

Do you use tobacco in any form?

No

Do you have or ever had Cancer?

No

If you had Cancer, how long ago?

Never

Do you play in any competitive sports?

No

Do you drink excessively?

No

If you drink Alcohol, what is your weekly intake?

Never

Are you pregnant?

No

If applicable, does anyone else in your family applying have any of the above conditions, diseases, and/or ever have or had cancer?

Child 1

If applicable, please fill out any dependent medical information.

asthma

Terms and Conditions for Unity Healthshare PLUS

HCSM Terms & Conditions

Unity HealthShare (UHS) Statement of Beliefs (AlieraCare; InterimCare, Catastrophic Care & Unity HealthShare)

At the core of what Unity HealthShare does, and how it relates to and engages with one another as a community of people, is a set of common beliefs.

UHS' Statement of Beliefs are as follows:

1. We believe that our personal rights and liberties originate from God and are bestowed on us by God.

2. We believe every individual has a fundamental religious right to worship God in his or her own way.

3. We believe it is our moral and ethical obligation to assist our fellow man when he/she is in need according to our available resources and opportunity.

4. We believe it is our spiritual duty to God and our ethical duty to others to maintain a healthy lifestyle and avoid foods, behaviors or habits that produce sickness or disease to ourselves or others.

5. We believe it is our fundamental right of conscience to direct our own healthcare, in consultation with physicians, family or other valued advisors.

Cost Sharing Understanding

- Unity HealthShare, a registered DBA, is a faith-based medical need sharing membership. Medical needs are only shared in by members per the membership guidelines. This application or membership is not issued by an insurance company, nor is it offered through an insurance company. This membership does not guarantee or promise that the eligible medical needs will be shared by the membership. This membership should never be considered as a substitute for an insurance policy.
- I understand that the membership is not insurance but is a voluntary medical needs sharing ministry, and that there are no representations, promises, or guarantees that my medical needs will be shared on my behalf. I also understand that sharing for medical needs does not come from an insurance company, but from the membership per the guidelines and membership Escrow Instructions. I also understand that any medical condition that is inquired about but not disclosed on this application, whether meeting the definition of a pre-existing condition or not, and then discovered after my membership is effective will be treated as if it had been disclosed at the time of application by applying the governing standards set forth in the Membership Eligibility Manual retroactively to my effective date of membership.
- I understand that the guidelines in effect on the date of medical services supersede any spoken or verbal communication and all previous versions of the guidelines. I also understand that with notice to the general membership the guidelines may change at any time based on the preferences of the membership, and decisions, recommendations and approval of the Board of Trustees.
- I understand that the guidelines are not a contract and do not constitute a promise or obligation to share, but instead are for UHS' reference in following the Membership Escrow Instructions. I also understand that the guidelines are part of and incorporated into this UHS Application as if appended to it.
- I understand that each child must be a dependent to participate on their parent’s membership. I also understand that eligibility for the membership for anyone, a dependent or otherwise, is based on the guidelines and that continued submission of monthly contributions does not extend an ineligible participant's membership.
- I understand that the application fee will be refunded automatically if all individuals on my application are declined for membership or if I withdraw my application prior to my membership effective date. I also understand that the application fee will not be refunded if, in the course of applying for membership, I fail to respond to written or verbal inquiries from UHS for more than sixty days. I also understand that the $25 donation portion of the application fee to UHS Ministries is

non-refundable.

- I understand that monthly contribution amounts are based on operating and medical needs and the total number of members and that monthly contributions are figured on a periodic basis as needed and are subject to change at any time. I also understand that the submission of my monthly contributions is voluntary and that I am not obligated in any way to send any money.

Terms and Conditions for AlieraCare PLUS

Terms and Conditions - Aliera Healthcare, Inc. (AHI)/HealthPass USA (HPUSA)

I acknowledge and understand that I am voluntarily becoming an Aliera member and that this agreement is non-transferable.

I acknowledge and understand that this agreement does not provide comprehensive health insurance coverage nor is it a contract of insurance.

I acknowledge and understand that I am responsible for any charges incurred for health care services performed outside of Aliera including but not limited to emergency room, hospital and specialty services and that Aliera will not bill insurance carriers for any services provided by Aliera.

I acknowledge and understand that Aliera must maintain a record of my health information and must protect the privacy of my health information as per the terms of the Notice of Privacy Practices. I understand and acknowledge that this policy is available for my review at any time at www.Alierahealthcare.com or upon request.

I acknowledge and agree to pre-pay my monthly care fee on or before its due date for the upcoming month. If I am unable to pay my fee(s) on time, I understand that I will be charged a $25 late fee initially and $25 per month thereafter and agree to owe the total late fee balance along with all past due monthly care fees and acknowledge that my service agreement may be terminated.

I acknowledge and understand that I may terminate this Member Agreement at any time and for any or for no reason by providing written notice to Aliera. Monthly fees will continue to accrue until written termination notice is received. Any pre-paid monthly care fees will be prorated to the date Aliera has received the written termination and refunded within ten (10) business days.

In addition, I acknowledge and understand that Aliera may terminate this Member Agreement by providing me written notice and any pre-paid monthly care fees will be prorated to the date of termination and refunded to me within ten (10) business days. Aliera will not terminate this Member Agreement solely based on health status.

I acknowledge and understand that Aliera may add or discontinue services or may increase my fee schedule at any time (but no more than once per year), and that I will be given, in writing, at least sixty (30) days' notice of such fee schedule changes.

I acknowledge and understand that if I am enrolled in Medicare I will receive a copy of the Medicare Opt-out Agreement for review and signature before my first appointment. (The Opt-out Agreement does not prevent me from receiving current or future Medicare benefits from non-Aliera providers; neither I nor my Aliera healthcare provider(s) will seek reimbursement from Medicare for the medical services I receive from Aliera.)

Rights & Responsibilities

I understand that I have the right to choose my personal health care clinician and to change my clinician at any time, for any reason. I understand that all reasonable efforts will be made to accommodate my request, but only if my new clinician's patient panel is open to new patients.

I understand that I have the right to receive accurate and easily understood information about Aliera's health care services, health care professionals and health care facilities. If I speak a language different from my clinician, have a physical or mental disability or do not understand something, I understand that Aliera will make its best effort to aid so I can make informed health care decisions. If I require interpreter services beyond what can be provided by Aliera, professional interpreters may be provided at an additional cost to me.

In the event of membership termination, I understand that I must complete a written Service Cancellation Form. Any differences in payment between my billing date and the date of cancellation will be refunded to me via the payment method I have chosen for my monthly care fee. I understand that if my account is overdue, I am responsible for resolving the outstanding balance prior to my service cancellation.

I understand that I have the right to considerate, respectful, and nondiscriminatory care from my Aliera healthcare participating clinician (s). I also understand that I am responsible for communicating clearly and respectfully with my clinician and Aliera participating medical team and staff members. Should I become dissatisfied with my care or Aliera services, I agree to notify Aliera immediately so my concerns may be addressed in a timely manner.

I understand that I have the right to know all my treatment options and to participate in my health care decisions. Parents, guardians, family members or other individuals whom I designate may represent me if I cannot make my own decisions.

I understand that I have the right to speak in confidence with my Aliera participating provider(s) and to have my health care information protected. I understand that Aliera will not disclose my information without my authorization or without a legal

obligation to do so. I also understand that I have the right to review and receive a copy of my personal medical record and may request that my health care provider(s) amend my record if I feel it is inaccurate or incomplete by contacting the Aliera HIM Department.

I understand that I have the right to a fair, fast and objective review of any complaint I have against my health care clinician(s) or any other staff, including complaints about wait times, operating hours, conduct of personnel, business practices, and adequacy of health care services and facilities. I agree to first bring any complaints to the attention of Aliera staff and to participate in the Aliera complaint and grievance process.

To receive the best possible care, I agree to be actively involved in my health care decisions and to disclose all relevant information to my Aliera health care clinician(s) so that they can help me achieve my health goals. I also agree to inform my Aliera health care clinician(s) of any healthcare services I receive outside of Aliera (such as emergency room, specialist, or hospital services).

I understand that I am responsible for not exposing myself or others to disease or danger. I understand that I can receive information from my Aliera health care clinician(s) about protecting the health and safety of myself and others.

HCSM Programs - Unity HealthShare (UHS) Statement of Beliefs

At the core of what Unity HealthShare does, and how it relates to and engages with one another as a community of people, is a set of common beliefs.

UHS' Statement of Beliefs are as follows:
1. We believe that our personal rights and liberties originate from God and are bestowed on us by God.
2. We believe every individual has a fundamental religious right to worship God in his or her own way.
3. We believe it is our moral and ethical obligation to assist our fellow man when he/she is in need according to our available resources and opportunity.
4. We believe it is our spiritual duty to God and our ethical duty to others to maintain a healthy lifestyle and avoid foods, behaviors or habits that produce sickness or disease to ourselves or others.
5. We believe it is our fundamental right of conscience to direct our own healthcare, in consultation with physicians, family or other valued advisors.

Cost Sharing Understanding

Unity HealthShare, a registered DBA, is a faith-based medical need sharing membership. Medical needs are only shared in by members per the membership guidelines. This application or membership is not issued by an insurance company, nor is it offered through an insurance company. This membership does not guarantee or promise that the eligible medical needs will be shared by the membership. This membership should never be considered as a substitute for an insurance policy.

I understand that the membership is not insurance but is a voluntary medical needs sharing ministry, and that there are no representations, promises, or guarantees that my medical needs will be shared on my behalf. I also understand that sharing for medical needs does not come from an insurance company, but from the membership per the guidelines and membership Escrow Instructions. I also understand that any medical condition that is inquired about but not disclosed on this application, whether meeting the definition of a pre-existing condition or not, and then discovered after my membership is effective will be treated as if it had been disclosed at the time of application by applying the governing standards set forth in the Membership Eligibility Manual retroactively to my effective date of membership.

I understand that the guidelines in effect on the date of medical services supersede any spoken or verbal communication and all previous versions of the guidelines. I also understand that with notice to the general membership the guidelines may change at any time based on the preferences of the membership, and decisions, recommendations and approval of the Board of Trustees.

I understand that the guidelines are not a contract and do not constitute a promise or obligation to share, but instead are for UHS' reference in following the Membership Escrow Instructions. I also understand that the guidelines are part of and incorporated into this UHS Application as if appended to it.

I understand that each child must be a dependent to participate on their parent’s membership. I also understand that eligibility for the membership for anyone, a dependent or otherwise, is based on the guidelines and that continued submission of monthly contributions does not extend an ineligible participant's membership.

I understand that the $125 application fee will be refunded automatically if all individuals on my application are declined for membership or if I withdraw my application prior to my membership effective date. I also understand that the application fee will not be refunded if, in the course of applying for membership, I fail to respond to written or verbal inquiries from UHS for more than sixty days. I also understand that the $25 donation portion of the application fee to UHS Ministries is non-refundable.

I understand that monthly contribution amounts are based on operating and medical needs and the total number of members and that monthly contributions are figured on a periodic basis as needed and are subject to change at any time. I also understand that the submission of my monthly contributions is voluntary and that I am not obligated in any way to send any money.

Payment Method

Type: Credit Card
Name: Hanna ALBINA
Number: [redacted]
Expiration: [redacted]

Electronic Signature

By electronically acknowledging this authorization, I acknowledge that I have read and agree to the terms and conditions set forth in this agreement.

Name: Hanna albina
Date: July 19, 2018 at 4:33:09 PM
IP Address: [redacted]
System: [redacted]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

HANNA ALBINA and AUSTIN WILLARD, individually and on behalf of others similarly situated, Plaintiffs, vs. THE ALIERA COMPANIES, INC., TRINITY HEALTHSHARE, INC., and ONESHARE HEALTH, LLC d/b/a UNITY HEALTHSHARE, LLC, Defendants.	CIVIL ACTION NO. 5:20-cv-00496-JMH

DECLARATION OF NANCY G. ATKINS

I, Nancy G. Atkins, declare as follows:

1. I am over the age of eighteen, and I am competent to testify regarding the matters contained herein.

2. I am the Chief Regulatory Officer at OneShare Health, LLC, which was formerly known as Unity. Before I joined OneShare, I was Commissioner of the Kentucky Department of Insurance. I have more than 30 years of experience in the insurance industry.

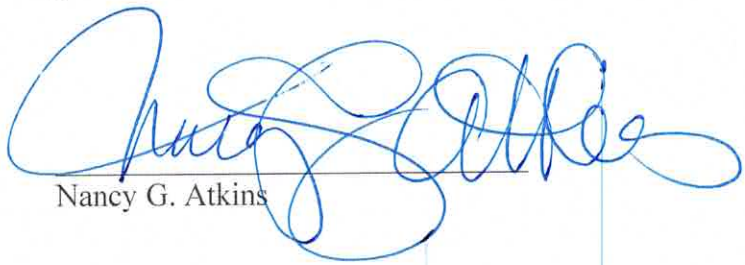
3. The Kentucky Department of Insurance has taken no adverse action against OneShare.

4. The Kentucky Department of Insurance has not claimed that OneShare is operating as "illegal insurance" or taken the position that OneShare is not a valid health care sharing ministry.

5. OneShare meets the requirements under Kentucky's safe harbor statute for health care sharing ministries, KRS 304.1-120(7), and thus is not subject to being regulated as insurance.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: February 22, 2021.



Nancy G. Atkins

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

HANNA ALBINA and AUSTIN WILLARD, individually and on behalf of others similarly situated, Plaintiffs, vs. THE ALIERA COMPANIES, INC., TRINITY HEALTHSHARE, INC., and ONESHARE HEALTH, LLC d/b/a UNITY HEALTHSHARE, LLC, Defendants.	CIVIL ACTION NO. 5:20-cv-00496-JMH

ORDER

This matter comes before the Court on Defendant OneShare Health, LLC's Motion to Compel Arbitration Or, in the Alternative, to Dismiss Counts I-IV. The Court, having reviewed the parties' arguments and being otherwise sufficiently advised, hereby **GRANTS** OneShare's Motion to Compel Arbitration and finds that Plaintiffs' claims against OneShare are subject to mandatory arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Plaintiffs shall arbitrate their claims against Oneshare. Plaintiffs' claims against OneShare are hereby **DISMISSED** without prejudice.